

LABOR CABINET
Department of Workplace Standards
(Amendment)

803 KAR 1:075. Exclusions from minimum wage and overtime.

RELATES TO: KRS 337.275, 337.285

STATUTORY AUTHORITY: KRS 337.295

NECESSITY, FUNCTION, AND CONFORMITY: KRS 337.010 excludes certain types of employees from being subject to the minimum wage and overtime provisions of KRS 337.275~~[the act]~~ and KRS 337.285 excludes certain employees from its coverage. The function of this administrative regulation is to define these exclusions. These definitions will guide the department~~[office]~~ in carrying out its responsibilities under the law and assist employers who may be concerned with the provisions of the law in understanding their obligations under the law.

Section 1. Definitions. (1) "Excise taxes" means taxes that are levied on the manufacture, sale or consumption of a commodity, and taxes levied on license to pursue certain occupations and corporate privileges~~[The term "retail store or service industry" shall mean an establishment seventy-five (75) percent of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry].~~

(2) "Hotel" ~~[The term "hotel"]~~ means an establishment known to the public as a hotel, which is primarily engaged in providing lodging or lodging and meals for the general public. Included are hotels operated by membership organizations and open to the general public and apartment hotels which provide accommodations for transients. However, an establishment whose income is primarily from providing a permanent place of residence or from providing residential facilities complete with bedrooms and kitchen for prolonged periods shall~~would~~ not be considered a hotel.

(3) "Motel" ~~[The term "motel"]~~ means an establishment which provides services similar to that of a hotel described in subsection (2) of this section, but which caters mostly to the motor-ing public, providing it with motor car parking facilities either adjacent to the room or cabin rented or at some other easily accessible place. Included in the term "motel" are those establishments known to the public as motor hotels, motor lodges, motor courts, motor inns, tourist courts, and tourist lodges.

(4) "Restaurant" ~~[The Term "restaurant"]~~ means an establishment which is primarily engaged in selling and serving to purchasers at retail prepared food and beverages for consumption. This includes ~~[such]~~ establishments commonly known as lunch counters, refreshment stands, cafes, cafeterias, coffee shops, diners, dining rooms, lunch rooms, or tea rooms. The term "restaurant" shall~~does~~ not include drinking establishments, such as bars or cocktail lounges, whose sale of alcoholic beverages exceed the receipts from sales of prepared foods and nonalcoholic beverages or establishments offering meal service on a boarding or term basis or providing the~~[such]~~ service only as an incident to the operation of a business of another kind and primarily to meet institutional needs for continuing meal service to persons whose continued presence is required for ~~[such]~~ operation, such as a boarding house, dining facilities of a boarding school, college or university which serves its students and faculty, lunchroom facilities for private and public day school students, and other institutional food service facilities providing long-term meal service to stable groups of individuals as an incident to institutional operations in a manner wholly dissimilar to the typical transactions between a restaurant and its customers.

(5) "Retail store or service industry" shall mean an establishment seventy-five (75) percent of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry~~["Excise taxes" are taxes levied on the manufacture, sale or consumption of a commodity, and taxes levied on license to pursue certain occupations and corporate privileges].~~

Section 2. Hotel or Motel. The primary function of a hotel or motel, is to provide lodging facilities to the public. In addition, most hotels or motels provide food for their guests and many sell alcoholic beverages. These establishments also may engage in some minor revenue producing activities; such as, the operation of valet services offering cleaning and laundering service for the garments of their guests, news stands, hobby shops, renting out of their public rooms for meetings, lectures, dances, trade exhibits and weddings. The exemption provided for hotels and motels in KRS 337.010(2)(a)(vi) and KRS 337.285 ~~shall~~will not be defeated simply because a hotel or a motel engages in all or some of these activities, if it is primarily engaged in providing lodging facilities, food and drink to the public.

Section 3. Exemptions from Minimum Wage and Overtime. (1) Employees of retail stores, service industries, hotels, motels, and restaurant operations whose average annual gross volume of sales made for business done is less than \$95,000 for the five (5) preceding years exclusive of excise taxes at the retail level ~~shall be~~are exempt from both the minimum wage and overtime provisions of the ~~statutes~~act.

(2) To qualify for this exemption, the establishment ~~shall~~must be recognized as retail in the particular industry. Typically a retail or service establishment is one which sells goods or services to the general public. It serves the everyday needs of the community in which it is located. The retail or service establishment performs a function in the business organization which is at the ~~[very]~~ end of the stream of distribution, disposing in small quantities of the products and skills of ~~the~~such organization and does not take part in the manufacturing process.

(3)(a) To compute the average annual gross volume of sales made for business done, ~~[it will be necessary for]~~ the business ~~shall~~to add all the sales made for business done for the five (5) preceding years, exclusive of excise taxes at the retail level, and divide by five (5). If this average is less than \$95,000, the establishment ~~shall~~would be exempt.

(b) If the establishment has been in business for less than five (5) years, the gross sales ~~shall~~will be totaled for the years the establishment has been in business and divided by the number of years. If this average is less than \$95,000, the establishment ~~shall~~would be exempt.

(c) If the establishment has been in business for less than one (1) year, the gross sales ~~shall~~will be totaled for the number of months the establishment has been in business and divided by the number of months. This amount ~~shall~~will then be multiplied by twelve (12). If this amount is less than \$95,000, the establishment ~~shall~~would be exempt.

(d) Excise taxes at the retail level ~~shall~~are not ~~be~~ computed in totaling the gross volume of sales. Excise taxes which are levied at the ~~manufacturers~~manufacturer's, ~~wholesalers~~wholesaler's or other distributive level ~~shall~~will not be excluded in calculating the dollar volume of sales.

Section 4. Exemptions from Overtime. (1) Employees of retail stores whose principal duties are connected with the selling, purchasing, and distributing of goods and employees of a restaurant, hotel and motel operation; any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; any sales person~~salesman~~, parts

person[man], or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if the employee[he] is employed by a nonmanufacturing establishment primarily engaged in the business of selling the[such] vehicles or implements to ultimate purchasers; or any sales person[salesman] primarily engaged in selling trailers, boats, or aircraft, if the employee[he] is employed by a nonmanufacturing establishment primarily in the business of selling trailers, boats, or aircraft to ultimate purchasers; [and] any driver employed by an employer engaged in the business of operating taxi cabs; [or to] employees whose function is to provide twenty-four (24) hour residential care on the employer's premises in a parental role to children who are primarily dependent, neglected and abused and who are in the care of private non-profit child caring facilities licensed by the Cabinet for Health and Family Services under KRS Chapter 199, and any individual who is employed by a third-party employer or agency other than the family or household using his or her services to provide in-home companionship services for a sick, convalescing, or elderly person shall be [are] exempt from the overtime provisions of KRS 337.285.

(2) Employees of a retail store whose principal duties are not connected with the selling, purchasing, and distributing of the goods shall[will] not be considered as exempt employees, nor will employees of a service establishment which does not sell goods, but is in the business of selling a service.

Kimberlee C. Perry, Commissioner

Larry L. Roberts, Secretary

APPROVED BY AGENCY: June 14, 2021

FILED WITH LRC: June 14, 2021 at 2021 at 2:11 p.m.

PUBLIC HEARING AND PUBLIC COMMENT PERIOD: A public hearing on this administrative regulation shall be held on August 23, 2021 at 2:00 p.m. (ET). This hearing will be conducted by live videoconference (ZOOM) pursuant to Senate Bill 150, Section 1, subparagraph 8(b) (R.S. 2020) and the continuing state of emergency due to the novel coronavirus pandemic. Public access to the meeting will be available at <https://us02web.zoom.us/j/83102207739?pwd=dUFjQzE0ZnJJdkpwME51ZWtQdUlydz09>, password 265686 or by telephone at (713) 353-0212 or 888-822-7517 (toll free), conference code 278497. Individuals interested in being heard at this hearing shall notify this agency in writing five (5) working days prior to the hearing of their intent to attend. If no notification of intent to attend the hearing is received by that date, the hearing may be canceled. This hearing is open to the public. Any person who wishes to be heard will be given an opportunity to comment on the proposed administrative regulation. A transcript of the public hearing will not be made unless a written request for a transcript is made. If you do not wish to attend the public hearing, you may submit written comments on the proposed administrative regulation. Written comments shall be accepted through August 31, 2021. Send notification of intent to be heard at the public hearing or written comments on the proposed administrative regulation to the contact person.

CONTACT PERSON: Erin Bravo, Mayo-Underwood Building, 500 Mero Street, 3rd Floor, Frankfort, KY 40601; phone (502) 564-1554; fax (502) 564-5484, email erin.bravo@ky.gov.

REGULATORY IMPACT ANALYSIS AND TIERING STATEMENT

Contact Person: Erin Bravo

(1) Provide a brief summary of:

(a) What this administrative regulation does: This administrative regulation defines exclusions contained in KRS 337.275 and 337.285.

(b) The necessity of this administrative regulation: This administrative regulation is necessary to define the exclusions defined in KRS 337.275 and 337.285 to help guide the department and assist employers in understanding the requirements under the law.

(c) How this administrative regulation conforms to the content of the authorizing statutes: KRS 337.295 authorizes the commissioner to promulgate administrative regulations under KRS 337.275 to 337.325, 337.345, and 337.385 to 337.405.

(d) How this administrative regulation currently assists or will assist in the effective administration of the statutes: This administrative regulation provides clarification on employees who are excluded from requirements in KRS 337.275 and 337.285.

(2) If this is an amendment to an existing regulation, provide a brief summary of:

(a) How this amendment will change this existing administrative regulation: The amendment updates the administrative regulation to match the current language that is utilized by the department, ensure compliance with KRS Chapter 13A, and exempts from overtime requirements in KRS 337.285 individuals who are employed by a third-party or agency other than the family or household using the services to provide in-home companionship services for a sick, convalescing or elderly individual.

(b) The necessity of the amendment to this administrative regulation: This amendment is necessary to update language to ensure compliance with KRS Chapter 13A, ensures effective guidance for the statutory provisions under KRS Chapter 337.275 and 337.285, and update exemptions for overtime requirements under KRS 337.285.

(c) How the amendment conforms to the content of the authorizing statutes: KRS 337.295 authorizes the commissioner to promulgate administrative regulations under KRS 337.275 to 337.325, 337.345, and 337.385 to 337.405. This amendment updates the administrative regulation to match current language utilized by the department.

(d) How the amendment will assist in the effective administration of the statutes: This amendment updates language to clarify the guidance provided in the administrative regulation and provide employers with guidance on employees who are exempt from overtime pay requirements.

(3) List the type and number of individuals, businesses, organizations, or state and local governments affected by this administrative regulation: This administrative regulation affects all subject employers who employ employees in the Commonwealth subject to KRS Chapter 337, as well as, their employees.

(4) Provide an analysis of how the entities identified in question (3) will be impacted by either the implementation of this administrative regulation, if new, or by the change, if it is an amendment, including:

(a) List the actions that each of the regulated entities identified in question (3) will have to take to comply with this administrative regulation or amendment: No additional compliance duties are required by this amendment.

(b) In complying with this administrative regulation or amendment, how much will it cost each of the entities identified in question (3): There is no additional cost associated with this amendment.

(c) As a result of compliance, what benefits will accrue to the entities identified in question (3): Improved employee protection and guidance for employers on exemptions to overtime requirements pursuant to KRS 337.275 and 337.285.

(5) Provide an estimate of how much it will cost to implement this administrative regulation:

(a) Initially: This administrative regulation, as amended, is not anticipated to generate any new or additional costs.

(b) On a continuing basis: This administrative regulation, as amended, is not anticipated to generate any new or additional costs.

(6) What is the source of the funding to be used for the implementation and enforcement of this administrative regulation: Current state funding.

(7) Provide an assessment of whether an increase in fees or funding will be necessary to implement this administrative regulation, if new or by the change if it is an amendment: This administrative regulation, as amended, is not anticipated to generate any increase in fees or funding.

(8) State whether or not this administrative regulation establishes any fees or directly or indirectly increases any fees: There are no fees associated with this administrative regulation.

(9) TIERING: Is tiering applied? Tiering is not applied. All subject employers and employees covered by KRS Chapter 337 are treated equally.

FISCAL NOTE ON STATE OR LOCAL GOVERNMENT

1. What units, parts, or divisions of state or local government (including cities, counties, fire departments, or school districts) will be impacted by this administrative regulation? Most state and local governmental entities are subject to KRS Chapter 337.

2. Identify each state or federal statute or regulation that requires or authorizes the action taken by the administrative regulation. KRS 337.295.

3. Estimate the effect of this administrative regulation on the expenditures and revenues of a state or local government agency (including cities, counties, fire departments, or school districts) for the first full year the administrative regulation is to be in effect.

(a) How much revenue will the administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for the first year? This administrative regulation will not generate revenue.

(b) How much revenue will the administrative regulation generate for the state or local government (including cities, counties, fire departments, or school districts) for subsequent years? This administrative regulation will not generate revenue.

(c) How much will it cost to administer this program for the first year? There is no cost to this amendment.

(d) How much will it cost to administer this program for subsequent years? There is no cost to this amendment.

Note: If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-): Unknown

Expenditures (+/-): Unknown

Other explanations: This amendment does not impose any additional requirements or expenditures.